

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UBALDO ROMERO,

Petitioner, : 08 Civ. 8380 (CM) (HBP)

-against-

OPINION
AND ORDER

DAVID NAPOLI, Superintendent
for Southport Correctional
Facility,

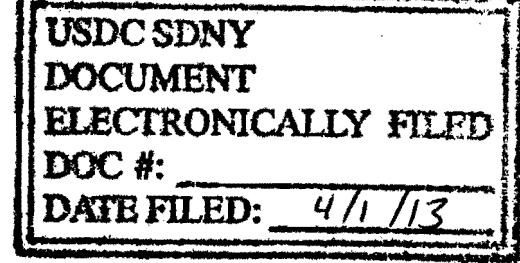
Respondent. :

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PITMAN, United States Magistrate Judge:

By notice of motion dated November 16, 2012 (Docket Item 58), petitioner moves to file an amended petition. For the reasons set forth below, petitioner's motion is denied without prejudice.

Petitioner is currently in the custody of the New York State Department of Corrections and Community Supervision, having been convicted of two counts of murder in the second degree and sentenced to two consecutive sentences of twenty-five years to life. The petition raises three claims: (1) the evidence was insufficient to sustain the verdict; (2) petitioner's double jeopardy rights were violated by his second trial because the evidence offered at petitioner's first trial, which ended in a hung jury, was insufficient to sustain a conviction, and (3)



petitioner was deprived of due process because the indictment failed to allege the essential elements of an offense and, therefore, failed to apprise petitioner of the charges he had to confront at trial. Respondent has offered compelling arguments that the first claim fails on the merits and that the latter two claims are procedurally barred.

Petitioner has not submitted a copy of the proposed amended petition with the present motion nor does he describe the specific amendments petitioner seeks to make. Rather all that petitioner offers is a vague statement that wishes "to clarify or amplify the claim attempted to be set forth in the original pleadings" (Petitioner's Affirmation in Support of his Motion to Amend, dated November 16, 2012, annexed to the Notice of Motion (Docket Item 58), ¶ 3).

Although leave to amend a pleading must be "freely give[n] . . . when justice so requires," Fed.R.Civ.P. 15(a)(2), no litigant has an unfettered right to amend a pleading, where, as here, a responsive pleading has actually been served. Leave to amend may be denied for a variety of reasons, "undue delay, bad faith, futility of the amendment, and perhaps most important, the resulting prejudice to the opposing party." State Teachers Retirement Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981). Thus, a party seeking to serve and file an amended complaint,

after the time to amend as a matter of right has expired, ordinarily files a proposed amended pleading with his motion to amend. Where, as here, the movant fails to file a copy of the proposed amended pleading (or at least a detailed description of the proposed amendments) with his motion to amend, it is impossible to assess whether leave to amend should be granted and the motion to amend is ordinarily denied without prejudice to a renewed motion accompanied by a copy of the proposed amended pleading. Zito v. Leasecomm Corp., 02 Civ. 8072 (GEL), 2004 WL 2211650 at *25 (S.D.N.Y. Sept. 30, 2004) (Lynch, then D.J., now Cir. J.), quoting Smith v. Planas, 151 F.R.D. 547, 550 (S.D.N.Y. 1993) (Lowe, D.J.); National Fire & Marine Ins. Co. v. Railroad Resource & Recovery, Inc., 93 Civ. 6379 (RLC), 1994 WL 606049 at *1 (S.D.N.Y. Nov. 3, 1994) (R.L. Carter, D.J.); Sanders v. Grenadier Realty, Inc., 08 Civ. 3920 (WHP), 2009 WL 1270226 at (S.D.N.Y. May 6, 2009), aff'd, 367 F. App'x 173 (2nd Cir. 2010); Santiago v. Steinhart, 89 Civ. 2069 (RPP), 1993 WL 106302 at *4 (S.D.N.Y. Apr. 5, 1993) (Patterson, D.J.). There does not appear to be any reason to depart from that practice in this case.

Accordingly, petitioner's motion to file an amended petition is denied without prejudice to a renewed petition that

either annexes a copy of the proposed amended petition or sets forth a detailed description of the proposed amendments.

Dated: New York, New York
April 1, 2013

SO ORDERED


HENRY PITMAN
United States Magistrate Judge

Copies mailed to:

Mr. Ubaldo Romero
DIN 02-A-1716
Wende Correctional Facility
3040 Wende Road
Alden, New York 14004-1187

Susan Gliner, Esq.
Assistant District Attorney
New York County
One Hogan Place
New York, New York 10013